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NOV 3 1960
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No. 292

In the

Supreme Court of the United States

OCTOBER TERM, 1960

KENNETH C. BIVINS,

Petitioner,

v.

GULF OIL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

On October 10, 1960, this Honorable Court entered its order in this cause, to-wit: "The Petition for Writ of Certiorari is denied. The Chief Justice and Mr. Justice Black are of the opinion certiorari should be granted."

Petitioner, Kenneth C. Bivins, prays that this Court grant rehearing of its said order, and further prays:

(1) that the said order be vacated, that the Judgment of the Court of Appeals for the Fifth Circuit be vacated, and that the Judgment of the Trial Court be affirmed; or in the alternative,

(2) that said order be vacated, that the case be transferred to the summary calendar for oral argument, and upon final hearing that the Judgment of the Court of Appeals be vacated and the Judgment of the Trial Court be affirmed; or, in the alternative,

(3) that said order be amended by vacating the Judgment of the Court of Appeals and by directing that the case be remanded to the Court of Appeals for further proceedings; and

(4) that in any event, said order be amended to leave no doubt that the law established by the Supreme Court of Texas in *Galveston-Houston Electric Ry. Co. v. Reinle, 258 S. W. 803*, is the law of this case.

on the following grounds and for the following reasons, to-wit:

I.

Counsel for your Petitioner would never be other than candid and sincere with this Honorable Court. Therefore we will do our utmost to point out to your Honors, in a different manner, the glaring conflict between the Federal law and Texas law, created by the Court of Appeals for the Fifth Circuit by its opinion, *258 F. 2d 753*. To do so, most briefly, we respectfully refer the Court to:

(a) The *record of this case* wherein the *Jury found* that Respondent's failure to warn Petitioner of the

dangerous condition on its land was *negligence* which was *a proximate cause* of his injuries (R. 162, 169);

(b) The opinion of the Court of Appeals at *276 F. 2d 753, 758* (Petition for Writ of Certiorari, p. 29) wherein the Court of Appeals held:

> "* * * the owner or occupier of particular property has a duty to warn the employees of an independent contractor who has undertaken to do work on the property, of dangers that are hidden on or inhere in that property, and that *this duty is discharged if those in charge of the work* for the independent contractor *are given warning or have knowledge* of the danger * * *." (Emphasis added.)

(c) The law controlling in this case, as laid down by the Texas Supreme Court in *Galveston-Houston Electric Ry. Co. v. Reinle, 258 S. W. 803, 806* (Petition for Writ of Certiorari, Appendix, pp. 51, 59), wherein the Supreme Court in answer to a certified question held:

> "* * * it was the *duty* of the * * * (occupier) *to exercise ordinary care* to give Reinle notice or warning of the danger * * *, *notwithstanding Reinle was* an *employee not of the* * * * *(occupier) but of the independent contractor, who possessed full knowledge* of the danger." (Emphasis added.)

(d) The most recent Texas Supreme Court case solidifying the law of *Reinle*, supra [to-wit: *Houston Lighting and Power Company v. Brooks (1960), 336 S. W. 2d 603, 607* (Petition for Writ of Certiorari, Appendix, pp. 63, 72)] wherein the Supreme Court approved and distinguished *Reinle*.

(e) The history of *Reinle* (Petition for Writ of Certiorari, Appendix, p. 61) showing that *Reinle* is the law of Texas and the Fifth Circuit, *or at least it*

was in the Fifth Circuit as evidenced by its having been cited four (4) times by that Court.

We cannot do more to show the Court that we are correct on the law applicable here, to-wit: *Reinle*, supra. However, the Fifth Circuit ignored it (Petition for Writ of Certiorari, pp. 7, 8).

We are correct in urging your Honors to vacate the Fifth Circuit's Judgment not only on the ground that it is in direct violation of the *Erie* doctrine, but also on the ground that the Fifth Circuit violated Petitioner's rights under the Seventh Amendment. In this regard the Fifth Circuit held that Respondent's failure to warn Petitioner of the hidden danger was not negligence, *even though on uncontradicted evidence the Jury found that it was negligence!*

Unless the Court does vacate the Judgment of the Court of Appeals, that Judgment and the concurrent opinion will result in unmitigated chaos in the Federal-Texas law. Furthermore, of broader significance, such will be an open invitation to other Courts of Appeals, as well as the Fifth Circuit, to ignore the *Erie* doctrine and the rights guaranteed by the Seventh Amendment.

II.

It appears that the Court has denied the Petition for Writ of Certiorari for reasons of policy. At this time we, Counsel for Petitioner, ask ourselves: Should we urge the

Court to grant the Writ *as a matter of policy?* If so, to what extent should the Court's policy in this regard be discussed?

We trust that we are correct in going into this matter. Also, we trust that the Court will accept our argument in this respect in the spirit in which it is urged, to-wit: good faith.

We sincerely appreciate the Court's plight caused by its crowded docket. However, on a matter of such magnitude in a most vital area of our jurisprudence (to-wit: the Federal-State relationship in diversity actions), we urge that the Court should not refuse to rectify a wrong such as here, which can do nothing other than cause more confusion, simply on the grounds of *policy*. It is submitted that should this Court once more make it forcefully clear to the Courts of Appeals that any judgment entered in disregard of the Seventh Amendment or the *Erie* doctrine will be summarily vacated, fewer Petitions for Writs of Certiorari would be filed. Such a policy would do much to reduce the Court's crowded docket and to accord justice to every citizen in terms the lay citizen can understand.

Furthermore, although it is one involving a personal injury, this case is one of importance, as evidenced in part by the fact that four (4) of thirteen (13) Justices and Judges, who have been concerned with it, have ruled for Petitioner, and two (2) out of four (4) have ruled on the

merits. We urge that the Majority of this Honorable Court should, *as a matter of policy*, grant the Petition for Writ of Certiorari in order that the Court can hear the matter. We will convince your Honors of the validity and correctness of our position, if only we are accorded the opportunity to try. Reference to the Brief for Respondent in Opposition will be most helpful in our accomplishing this!

If a majority of this Court is of the opinion that the Court of Appeals erred in its ruling on the point of law under consideration (to-wit: the controlling force of *Reinle*, supra) and, hence, violated Petitioner's rights under the Seventh Amendment, we submit that the Judgment of the Court of Appeals should be vacated—regardless of *policy*. Of course, this is *merely* a personal injury case—but it is only one of many hundreds of such to arise in the future. We can not and do not believe this Court intends to deprive those injured persons of their constitutional rights, and rights established many years ago by this Court, simply because of *policy*. Having been taught and learned throughout life to love and respect the United States and this Court, we believe that *policy* must and will yield where a matter of such extreme importance to the entire Nation is involved, as here. *Brown v. Board of Education of Topeka*, *34 U. S. 483, 98 L. Ed. 873, 74 S. Ct. 686.*

Sincerely, we say to the Court that a full-dress hearing by your Honors would accomplish little more than is already evident to you. To protect your time and, inci-

dentally, to save the Parties hereto substantial sums, the Court's action in vacating the Judgment of the Court of Appeals and remanding the case to that Court for further proceedings not inconsistent with *Reinle*, supra, would be correct and would rectify a wrong without a reversal of the Court's policy. *Gibson v. Phillips Petroleum Co., 352 U. S. 874.*

III.

This case is absolutely and simply one in which the Court of Appeals substituted its opinion, *or finding of fact*, for that of the Jury on the disputed issue of Respondent's negligence in failing to warn Petitioner of the hidden danger. The evidence is that to support the Jury finding. It is uncontradicted. (R. 36, 113, 127, 154.)

For this reason alone, under all we love and cherish about this Nation and according to all principles of right and fair play, the Judgment of the Court of Appeals should be summarily vacated.

IV.

One other reason of extreme importance, not only to Petitioner Bivins and all oil field laborers, but to laborers in every field of endeavor throughout the Nation, remains to be considered—fraud on the laborer.

The evidence in this case is a perfect example of what can, and will, happen to the laborer, when the law an-

nounced by the Court of Appeals in this case is put into effect. *In fact, its implications are unimaginable.*

Here, Petitioner's employer, White, stated that approximately Sixty (60%) to Seventy (70%) Percent of his work (contracting) is done for Respondent. We can only leave it to the Court to make its own deductions concerning with whom White, or any other employer in such an economic bind, would "throw in" in a case such as this in the future. Most tragically, under the Judgment and opinion below, absolutely all that is necessary to preclude the workman in such a case as here is *either* that the independent-contractor *employer* "testify" that he *knew* about the danger *or* that the occupier of the land "testify" that he (it) *warned* the *employer* thereof.

If the Judgment below is permitted to stand, undoubtedly a new file labeled "Warnings to Independent Contractors" will be set up in the office of each occupier of land employing independent contractors. Upon being hired, each independent contractor would be furnished a mimeographed copy of each "warning" which had gone into the file—he would then be warned! Of course, the number and kinds of such warnings would be limited only by the imagination of the employee hired to write them.

We do not say this facetiously.

While this action would not comport with Texas law to absolve the occupier, it would meet the requirements of Fifth Circuit law.

For the foregoing reasons, each of which, we submit, is sufficient per se, we respectfully urge this Court to grant rehearing of its order and the relief sought.

Respectfully submitted,

WARREN BURNETT,
ED KEYS,
P. O. Box 3707,
Odessa, Texas,
Counsel of Record for Petitioner.

PHILIP S. KOURI,
Oil & Gas Building,
Wichita Falls, Texas,

Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

I further certify that a copy of the foregoing Petition for Rehearing has been deposited at Odessa, Texas, in a United States Post Office, with first class postage prepaid, addressed to Counsel of Record for Respondent, Gulf Oil Corporation, at their Post Office address, as follows: William L. Kerr and Max N. Osborne, P. O. Box 913, Midland, Texas, on this the day of November, 1960.

PHILIP S. KOURI